

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LEORA L. JOHNSON,)	
)	No. CV-11-74-JPH
Plaintiff,)	
)	ORDER GRANTING DEFENDANT'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	
MICHAEL J. ASTRUE, Commissioner)	
of Social Security,)	
)	
Defendant.)	
)	
)	

BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on April 27, 2012 (ECF No. 13, 20). Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney Jessica Milano represents the Commissioner of Social Security (defendant). The parties have consented to proceed before a magistrate judge, ECF No. 7. On April 9, 2012, plaintiff filed a reply, ECF No. 22. After reviewing the administrative record and the briefs filed by the parties, the court **grants** Defendant's Motion for Summary Judgment, ECF No. 20.

JURISDICTION

Plaintiff protectively applied for supplemental security income (SSI) and disability insurance benefits (DIB) on January 23, 2007, alleging disability as of September 1, 2003 (Tr. 279-281, 284-287). The applications were denied initially and on

1 reconsideration (Tr. 174-177, 184-185, 187-188).

2 Administrative Law Judge (ALJ) Robert S. Chester held the
3 first hearing on September 17, 2008 (Tr. 38-92), and issued an
4 unfavorable decision on October 16, 2008 (Tr. 159-170). The
5 Appeals Council granted review on December 23, 2008, vacated the
6 prior decision, and remanded for further proceedings (Tr. 225-
7 229).

8 The ALJ conducted a hearing after remand on December 2, 2009.
9 Plaintiff, represented by counsel, a doctor, a psychologist, and a
10 vocational expert testified (Tr. 95-148). On January 15, 2010, the
11 ALJ issued an unfavorable decision (Tr. 14-31). The Appeals
12 Council denied review on February 2, 2011 (Tr. 1-5). The ALJ's
13 January 2010 decision became the final decision of the
14 Commissioner, which is appealable to the district court pursuant
15 to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial
16 review on February 22, 2011 (ECF No. 1,4).

17 **STATEMENT OF FACTS**

18 The facts have been presented in the administrative hearing
19 transcript, the ALJ's decision, and the briefs of the parties.
20 They are only briefly summarized here.

21 Plaintiff was 43 years old at onset and 49 on the date of the
22 decision (Tr. 279). She earned a GED (Tr. 57). She has worked as a
23 cashier, electronics assembler and tester, wiring flex hose
24 assembler, hand packager, bartender, and home attendant (Tr. 59-
25 60, 84).

26 *A. 2008 hearing*

27 At the time of the first hearing, plaintiff was in physical
28 therapy for knee problems (Tr. 62). Medication helps with

1 depression. Other than seeing Dr. Mabee [for evaluations] once or
2 twice a year, plaintiff was not receiving mental health counseling
3 (Tr. 68). She likes to play pool, camp, and sew (Tr. 71-72). Back
4 pain limits sitting and standing to 20 to 30 minutes. She has been
5 diagnosed with psoriatic arthritis (Tr. 75, 77). She stopped
6 drinking and using marijuana on February 15, 2007, but relapsed
7 once by drinking in July 2007 (Tr. 78-79).

8 *B. 2009 hearing*

9 At the hearing after remand, on December 2, 2009, plaintiff
10 testified she quit using drugs and alcohol in July 2007 (Tr. 124-
11 125). The swelling and pain in her joints and left hand had
12 worsened, left shoulder pain continued despite surgery, and she
13 has pain in the neck, back, knees, and elbows. She experiences
14 headaches and sleep problems. Plaintiff can walk 6 to 8 blocks.
15 She can sit and stand 15 to 20 minutes. Bending and squatting are
16 difficult. Medication makes her drowsy. She watches television and
17 sings karaoke once or twice a month if she is up to it. She cooks
18 easy meals, sweeps, washes dishes, and takes the bus (Tr. 127-134,
19 139).

20 **SEQUENTIAL EVALUATION PROCESS**

21 The Social Security Act (the Act) defines disability as the
22 as the "inability to engage in any substantial gainful activity by
23 reason of any medically determinable physical or mental impairment
24 which can be expected to result in death or which has lasted or
25 can be expected to last for a continuous period of not less than
26 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act
27 also provides that a Plaintiff shall be determined to be under a
28 disability only if any impairments are of such severity that a

1 plaintiff is not only unable to do previous work but cannot,
2 considering plaintiff's age, education and work experiences,
3 engage in any other substantial gainful work which exists in the
4 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
5 Thus, the definition of disability consists of both medical and
6 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
7 (9th Cir.2001).

8 The Commissioner has established a five-step sequential
9 evaluation process for determining whether a person is disabled.
10 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
11 is engaged in substantial gainful activities. If so, benefits are
12 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,
13 the decision maker proceeds to step two, which determines whether
14 plaintiff has a medically severe impairment or combination of
15 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

16 If plaintiff does not have a severe impairment or combination
17 of impairments, the disability claim is denied. If the impairment
18 is severe, the evaluation proceeds to the third step, which
19 compares plaintiff's impairment with a number of listed
20 impairments acknowledged by the Commissioner to be so severe as to
21 preclude substantial gainful activity. 20 C.F.R. §§
22 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
23 App. 1. If the impairment meets or equals one of the listed
24 impairments, plaintiff is conclusively presumed to be disabled.
25 If the impairment is not one conclusively presumed to be
26 disabling, the evaluation proceeds to the fourth step, which
27 determines whether the impairment prevents plaintiff from
28 performing work which was performed in the past. If a plaintiff is

1 able to perform previous work, that Plaintiff is deemed not
2 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
3 this step, plaintiff's residual functional capacity (RFC)
4 assessment is considered. If plaintiff cannot perform this work,
5 the fifth and final step in the process determines whether
6 plaintiff is able to perform other work in the national economy in
7 view of plaintiff's residual functional capacity, age, education
8 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
9 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

10 The initial burden of proof rests upon plaintiff to establish
11 a *prima facie* case of entitlement to disability benefits.
12 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir.1971); *Meanel v.*
13 *Apfel*, 172 F.3d 1111, 1113 (9th Cir.1999). The initial burden is
14 met once plaintiff establishes that a physical or mental
15 impairment prevents the performance of previous work. The burden
16 then shifts, at step five, to the Commissioner to show that (1)
17 plaintiff can perform other substantial gainful activity and (2) a
18 "significant number of jobs exist in the national economy" which
19 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
20 Cir.1984).

21 Plaintiff has the burden of showing that drug and alcohol
22 addiction (DAA) is not a contributing factor material to
23 disability. *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir.2001).
24 The Social Security Act bars payment of benefits when drug
25 addiction and/or alcoholism is a contributing factor material to a
26 disability claim. 42 U.S.C. §§ 423 (d)(2)(C) and 1382 (a)(3)(J);
27 *Bustamante v. Massanari*, 262 F.3d 949 (9th Cir.2001); *Sousa v.*
28 *Callahan*, 143 F.3d 1240, 1245 (9th Cir.1998). If there is evidence

1 of DAA and the individual succeeds in proving disability, the
2 Commissioner must determine whether DAA is material to the
3 determination of disability. 20 C.F.R. §§ 404.1535 and 416.935. If
4 an ALJ finds that the claimant is not disabled, then the claimant
5 is not entitled to benefits and there is no need to proceed with
6 the analysis to determine whether substance abuse is a
7 contributing factor material to disability. However, if the ALJ
8 finds that the claimant is disabled, then the ALJ must proceed to
9 decide if the claimant would be disabled if he or she stopped
10 using alcohol or drugs.

11 STANDARD OF REVIEW

12 Congress has provided a limited scope of judicial review of a
13 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
14 the Commissioner's decision, made through an ALJ, when the
15 determination is not based on legal error and is supported by
16 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9th
17 Cir.1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.1999).
18 "The [Commissioner's] determination that a plaintiff is not
19 disabled will be upheld if the findings of fact are supported by
20 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th
21 Cir.1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is more
22 than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119
23 n. 10 (9th Cir.1975), but less than a preponderance. *McAllister v.*
24 *Sullivan*, 888 F.2d 599, 601-602 (9th Cir.1989); *Desrosiers v.*
25 *Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th
26 Cir.1988). Substantial evidence "means such evidence as a
27 reasonable mind might accept as adequate to support a conclusion."
28 *Richardson v. Perales*, 402 U.S. 389, 401 (1971)(citations

1 omitted). "[S]uch inferences and conclusions as the [Commissioner]
2 may reasonably draw from the evidence" will also be upheld. *Mark*
3 *v. Celebrezze*, 348 F.2d 289, 293 (9th Cir.1965). On review, the
4 Court considers the record as a whole, not just the evidence
5 supporting the decision of the Commissioner. *Weetman v. Sullivan*,
6 877 F.2d 20, 22 (9th Cir.1989)(quoting *Kornock v. Harris*, 648 F.2d
7 525, 526 (9th Cir.1980)).

8 It is the role of the trier of fact, not this Court, to
9 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
10 evidence supports more than one rational interpretation, the Court
11 may not substitute its judgment for that of the Commissioner.
12 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
13 (9th Cir.1984). Nevertheless, a decision supported by substantial
14 evidence will still be set aside if the proper legal standards
15 were not applied in weighing the evidence and making the decision.
16 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,
17 433 (9th Cir.1987). Thus, if there is substantial evidence to
18 support the administrative findings, or if there is conflicting
19 evidence that will support a finding of either disability or
20 nondisability, the finding of the Commissioner is conclusive.
21 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.1987).

22 ALJ'S FINDINGS

23 The ALJ found plaintiff was insured through December 31,
24 2008. At step one, he found she did not engage in substantial
25 gainful activity after onset on September 1, 2003 (Tr. 17). At
26 step two he found plaintiff suffers from rheumatoid arthritis;
27 left shoulder fracture; status-post rotator cuff tear repair;
28 status-post carpal tunnel release surgery; degenerative disc

1 disease; major depressive disorder; generalized anxiety disorder;
2 and polysubstance abuse (DAA) (Tr. 17). At step three he found
3 Plaintiff's mental impairments meet the listings when DAA is
4 included (affective disorders, 12.04; anxiety related disorders,
5 12.06, and substance addiction disorders, 12.09)(Tr. 18). Because
6 he found plaintiff disabled when DAA is included, the ALJ went on
7 to determine if DAA was material to the disability determination.

8 When DAA is excluded, the ALJ found plaintiff's remaining
9 impairments would be severe but would not meet the listings (Tr.
10 20). He found plaintiff less than fully credible and assessed an
11 RFC for a range of medium work (Tr. 24-25, 28). At step four, the
12 ALJ found that, when DAA is excluded, plaintiff can perform her
13 past work as a hose assembler, shipping and receiving checker,
14 bartender, retail sales clerk, and computer assembler (Tr. 29).
15 The ALJ found DAA is a contributing factor material to the
16 disability determination (Tr. 30). Accordingly, he found plaintiff
17 is not disabled as defined by the Social Security Act (Tr. 30-31).

18 ISSUES

19 Plaintiff alleges the ALJ should have found at step three
20 that arthritis meets or equals listing 14.09 (inflammatory
21 arthritis). She also alleges the ALJ failed to properly weigh an
22 examining psychologist's opinion (ECF No. 14 at 13-14, 16-17).
23 Plaintiff does not challenge the ALJ's adverse credibility
24 determination on appeal.

25 The Commissioner asserts plaintiff fails to meet her burden
26 of proving she meets the listing because (1) she fails to show the
27 required findings (ECF No. 21 at 14-17) and (2) the ALJ correctly
28 relied on the more recent medical opinions of examining Dr. Rose

1 and testifying Dr. Winkler. Their opinions are supported by
2 "contemporaneous examination findings and treatment records" (ECF
3 No. 21 at 17-19). The defendant asserts the ALJ's reasons for
4 rejecting the contradicted opinions from Dr. Mabee's office are
5 valid, including inconsistencies between the opinions and
6 plaintiff's own reports to treating sources that medication
7 improved her mood (ECF No. 21 at 20-23). The defendant asks the
8 Court to affirm (ECF No. 21 at 2).

9 DISCUSSION

10 A. Step three

11 Plaintiff alleges the ALJ should have found at step three
12 that her arthritis meets Listing 14.09. She alleges the ALJ did not
13 meet his burden of obtaining a medical expert's opinion to
14 "clarify the nature and severity" of her arthritic condition (ECF
15 No. 14 at 13-14, 22 at 1-2).

16 Plaintiff fails to show the findings required to meet or
17 equal Listing 14.09. In addition, as the Commissioner correctly
18 observes, the ALJ favored the opinions of Robert Rose, M.D., who
19 examined plaintiff in May of 2009, and of Anne Winkler, M.D., who
20 testified at the 2010 hearing after reviewing all of the records.
21 Plaintiff's reliance on the vague 2008 opinion of Anthony Francis,
22 M.D., who testified at the hearing *before* remand, is misplaced.

23 B. Psychological limitations

24 Plaintiff alleges the ALJ failed to properly weigh the
25 contradicted opinions of examining psychologist W. Scott Mabee,
26 Ph.D. (ECF No. 14 at 16-17). The Commissioner responds, in part,
27 that the ALJ's reasons are valid (ECF No. 21 at 20-23).

28 The Commissioner is correct (see below).

1 **C. Credibility**

2 To aid in weighing the conflicting medical evidence, the ALJ
3 evaluated plaintiff's credibility and found her less than fully
4 credible (Tr. 28). Credibility determinations bear on evaluations
5 of medical evidence when an ALJ is presented with conflicting
6 medical opinions or inconsistency between a claimant's subjective
7 complaints and diagnosed condition. See *Webb v. Barnhart*, 433 F.3d
8 683, 688 (9th Cir.2005). As noted, plaintiff does not challenge
9 the ALJ's credibility assessment on appeal.

10 It is the province of the ALJ to make credibility
11 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
12 1995). However, the ALJ's findings must be supported by specific
13 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.
14 1990). Once the claimant produces medical evidence of an
15 underlying medical impairment, the ALJ may not discredit testimony
16 as to the severity of an impairment because it is unsupported by
17 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
18 1998). Absent affirmative evidence of malingering, the ALJ's
19 reasons for rejecting the claimant's testimony must be "clear and
20 convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir.1995).
21 "General findings are insufficient: rather the ALJ must identify
22 what testimony not credible and what evidence undermines the
23 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*
24 *Shalala*, 12 F.3d 915, 918 (9th Cir.1993).

25 The ALJ relied, in part, on noncompliance with treatment,
26 inconsistent statements, and activities inconsistent with claimed
27 severe limitations (Tr. 26-29).

28 Unexplained failure to comply with treatment Without

1 explanation, plaintiff failed to go to prescribed physical therapy
2 on numerous occasions (Tr. 27-28; see e.g. Tr. 667, 700).

3 Inconsistent statements Plaintiff has inconsistently
4 described substance abuse. On September 18, 2007, she told
5 treating source Barbara Tritt, PAC, she relapsed on marijuana two
6 weeks ago (Tr. 611). On September 5, 2007, plaintiff told Dr.
7 Mabee's office she had been clean since July 24, 2007 (Tr. 640).

8 Activities Plaintiff sings karaoke with friends twice a
9 month, visits family, plays pool, plays cards with friends, cares
10 for the elderly (including running errands), cooks, rides the bus,
11 walks up to a mile for exercise, and does light housekeeping (Tr.
12 26 338-339, 342, 427, 559, 686, 713, 726). If she needs money,
13 plaintiff recycles, does light housekeeping, or babysits (TR.
14 657). These activities are consistent with the ability to perform
15 work-like tasks and inconsistent with disabling limitations.

16 The ALJ's reasons for finding plaintiff less than fully
17 credible are clear, convincing, and fully supported by the record.

18 An ALJ may base an adverse credibility determination on
19 "unexplained or inadequately explained failure to seek treatment
20 or to follow a prescribed course of treatment" *Tommasetti v.*
21 *Astrue*, 533 F.3d 1035, 1039 (9th Cir.2008)(citations omitted).

22 A claimant's inconsistent statements support an adverse
23 credibility determination. See *Thomas v. Barnhart*, 278 F.3d 947,
24 958-959 (9th Cir.2002); *Nyman v. Heckler*, 779 F.2d 528, 531 (9th
25 Cir.1986).

26 It is well-established that the nature of daily activities
27 may be considered when evaluating credibility. *Fair v. Bowen*, 885
28 F.2d 597, 603 (9th Cir.1989).

1 An ALJ may reject a treating or examining physician's
2 contradicted opinion in reliance on the testimony of a
3 nonexamining advisor when the testimony is supported by other
4 evidence in the record and is consistent with it. *See Andrews v.*
5 *Shalala*, 53 F.3d 1035, 1041 (9th Cir.1995); *Allen v. Heckler*, 749
6 F.2d 577, 580 (9th Cir.1984). Dr. Klein's opinion is supported by
7 other evidence and consistent with it, including plaintiff's
8 complete lack of mental health treatment, the effectiveness of
9 medication at controlling symptoms, and activities in excess of
10 what would be expected from someone with plaintiff's allegedly
11 disabling limitations.

12 Although the evidence may support more than one rational
13 interpretation, the Court may not substitute its judgment for that
14 of the Commissioner where, as here, proper legal standards were
15 applied in weighing the evidence and making the decision. *See*
16 *Browner*, 839 F.2d at 433; *Sprague*, 812 F.2d at 1229-1230.

17 When evaluating conflicting medical opinions, an ALJ need not
18 accept the opinion of a doctor if that opinion is brief,
19 conclusory, and inadequately supported by clinical findings.
20 *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir.2005).

21 The reports from Dr. Mabee's office indicate (1) DAA was
22 active in the first evaluation in 2006. Plaintiff admitted she
23 continued to drink, yet she is diagnosed with cannabis dependence
24 in early partial remission. Alcohol use is not addressed. As Dr.
25 Klein points out, the "interview was not as thorough and the scope
26 was not as broad as one might have liked." (Tr. 23, 112-113, 493).
27 (2) In the second evaluation, plaintiff reports she no longer has
28 significant depression since taking celexa for the past two years

1 (Tr. 640). She is assessed as moderately limited by depressed
2 mood, and in the ability to control physical or motor movements
3 and maintain appropriate behavior, despite plaintiff's statement
4 and the lack of findings to support these limitations (Tr. 23,
5 647-648). (3) In the final evaluation in August of 2008, she is
6 diagnosed with ten moderate and two marked limitations, yet a GAF
7 of 60 is assessed, indicative of only moderate symptoms or
8 difficulty (Tr. 23-24, 653-654, 659). As the ALJ notes, opinions
9 contradicted by plaintiff's self-reported functioning and by test
10 results such as the Beck Depression Inventory, are specific,
11 legitimate reasons to reject these contradicted examiners'
12 opinions (Tr. 23-24, 29). An ALJ need not accept the opinions of a
13 doctor if that opinion is brief, conclusory, and inadequately
14 supported by clinical findings *Bayliss v. Barnhart*, 427 F.3d 1211,
15 1216 (9th Cir.2005).

16 The ALJ properly weighed the medical evidence of
17 psychological limitations and plaintiff's credibility. He came to
18 a reasonable conclusion based on the evidence in the record, and
19 that ends the court's inquiry on appeal. *Bayliss v. Barnhart*, 427
20 F.3d 1211, 1214 n. 1 (9th Cir.2005) ("If the record would support
21 more than one rational interpretation, we defer to the ALJ's
22 decision.").

23 The ALJ similarly properly weighed the evidence of physical
24 limitation, and came to a reasonable conclusion based on the
25 evidence. That ends this court's inquiry on appeal. *Bayliss*, 427
26 F.3d at 1214 n. 1.

27 After review the Court finds no harmful error in the ALJ's
28 decision.

CONCLUSION

Having reviewed the record and the ALJ's conclusions, this court finds that the ALJ's decision is free of legal error and supported by substantial evidence..

IT IS ORDERED:

1. Defendant's Motion for Summary Judgment, **ECF No. 20**, is **GRANTED**.

2. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is **DENIED**.

The District Court Executive is directed to file this Order, provide copies to the parties, enter judgment in favor of Defendant, and **CLOSE** this file.

DATED this 15th day of May, 2012.

s/ James P. Hutton
JAMES P. HUTTON
UNITED STATES MAGISTRATE JUDGE